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No. 96-787

In The

Supreme Court of the United States

October Term, 1996

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC. AND STEVEN LEWIS,

Petitioners,

v.

HALL & PHILLIPS and UNITED STATES *ex rel* ALNOOR VIRANI,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 19, 1996

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QUESTIONS PRESENTED

1. Does the term "reasonable" attorneys' fees in the False Claim Act include fees for unethical conduct or acts which were in furtherance of a fraud on the client or the Court.

2. Did the Courts below err in failing to decide whether the "reasonable" attorneys' fees awarded in this False Claims Act case included fees for unethical conduct and for acts which were in furtherance of a fraud on the client and the Court.

PARTIES TO THE PROCEEDING

Petitioners, Jerry M. Lewis Truck Parts & Equipment, Inc. and Steven Lewis were appellants below. Respondents Hall & Phillips and Alnoor Virani (litigating on behalf of the United States of America) were appellees below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jerry M. Lewis Truck Parts & Equipment, Inc. and Steven Lewis respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 89 F.3d 574 (1996) and is reprinted at Appendix ("App.") 1-18.

The District Court's unpublished order regarding the award of attorney's fees is reprinted at App. 19-37.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 10, 1996. Lewis filed a timely Petition for Rehearing, which was denied on August 21, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 31 U.S.C. § 3730 *et seq.*

PERTINENT STATUTORY PROVISION

If the Government proceeds with an action filed by a private person under the False Claims Acts, such person is entitled to receive, inter alia, reasonable attorneys' fees. 31 U.S.C. § 3730(d)(1).

Where a False Claims Act case is one which the Court finds to be based primarily on disclosures of information in a criminal case (other than information provided by the person bringing the action), the Court may award, in addition to reasonable attorneys' fees, such sums as it deems appropriate, but in no case more than 10 percent of the proceeds from the action, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. 31 U.S.C. § 3730(d)(1)

STATEMENT OF THE CASE

Many but not all of the relevant facts are set forth in the opinions below. The following is a summary of the essential facts:

In February of 1989, respondent Alnoor Virani retained the law firm of Hall & Phillips to represent him in a *qui tam* action filed pursuant to the False Claims Act against petitioners Jerry M. Lewis Truck Parts & Equipment, Inc. and Steven Lewis ("Lewis"). The case was filed by Virani following the federal criminal prosecution and conviction of petitioners for conduct identical to that involved in the *qui tam* action. Virani was the government's key witness and source of information in that criminal case. Hall & Phillips required Virani to sign a retainer agreement which provided, in part, as follows:

> It is understood that *no professional fees, costs or expenses will be charged by the attorneys for the services rendered to the client* [in connection with the Lewis litigation]. It is understood, however,

> that the attorneys reserve the right to seek a court award of costs, expenses and attorneys' fees from the opposing parties that is separate and apart from any percentage claim the client may be entitled to from the recovery of the United States Treasury. (App. 20) (emphasis added).

At the same time, Mr. Virani entered into an agreement with Taxpayers Against Fraud ("TAF") (a non-profit organization founded by John Phillips of Hall & Phillips) pursuant to which Virani and TAF would act as co-plaintiffs in the Lewis case. (App. 21). Based on the express representations that TAF would materially aid in the prosecution of the litigation and would advance litigation expenses, Virani agreed to give TAF 40% of any recovery awarded to Virani by the Court. Virani would retain the remaining 60%. *Id.*

However, in September of 1988, months before Virani retained Hall & Phillips, TAF and Hall & Phillips had entered into an agreement in which Hall and Phillips agreed to represent TAF in connection with several False Claims Act cases already being litigated, as well as future cases. TAF agreed to pay Hall & Phillips 66⅔% of its hourly rate, and also agreed to pay Hall & Phillips a contingency fee of 50% of any damages received by TAF in False Claims Act cases. Virani did not learn of the foregoing agreement between Hall & Phillips and TAF until after his *qui tam* action had concluded. (App. 21-22).

Following the District Court's questioning of TAF's status as co-relator in the case, and after Lewis had served discovery requests on TAF which would have exposed the secret contingency fee agreement between

TAF and Hall & Phillips, TAF and Virani executed a second agreement, which provided that, "TAF and Virani will be better served if TAF withdraws as a plaintiff in the case prior to defendants' challenge of its status." (App. 22; 38). That agreement further provided that despite TAF's withdrawal from the case, the previously agreed division of any proceeds of the action awarded to the *qui tam* plaintiffs in the case (*i.e.* 60% to Virani and 40% to TAF) would remain the same. (App. 22; 39). The agreement stated in that regard as follows:

> The previous agreement entered into between TAF and Mr. Virani . . . makes clear that the division of any proceeds awarded to the *qui tam* plaintiffs by the Court based on a percentage of the recovery to the United States Treasury **will not be affected by any adverse Court decision affecting the status of TAF in the case,** so that Mr. Virani will receive 60% of any such proceeds and TAF will receive 40% even if the Court dismisses TAF as a plaintiff. (Emphasis added.)

Id.

Again, the record below showed that neither Hall & Phillips nor TAF disclosed to Virani the long-standing contractual relationship between Hall & Phillips and TAF, the continuing obligation that TAF had to funnel to Hall & Phillips 50% of the sums assigned to TAF by Virani, or that it was solely the court's jurisdiction under the False Claims Act to determine if TAF was entitled to receive a share of the proceeds of the case. Virani was never advised to seek independent legal advice regarding the new TAF agreement. Also not disclosed to Virani by his counsel was the fact that, contrary to the terms of the new

agreement, TAF's withdrawal would provide no benefit to Virani, but would benefit only TAF and Hall & Phillips by removing TAF (and its financial agreements with Hall & Phillips) from further court scrutiny (scrutiny which, with respect to the size of a "bounty" award to a relator, the False Claims Act reserves to the court's *exclusive* jurisdiction.) (31 U.S.C. § 3730(d)(1)).

On January 31, 1991, Hall & Phillips filed a motion to withdraw TAF as a plaintiff/relator. The District Court granted the motion and dismissed TAF from the action on March 21, 1991. After minimal litigation, the case settled less than one year later on January 23, 1992. However, the court expressly reserved jurisdiction over two issues: (1) any claim by *qui tam* plaintiff Virani for attorneys' fees pursuant to the False Claims Act (31 U.S.C. § 3729 *et seq.*), and (2) the award to Virani from the proceeds of the settlement between the United States, Jerry M. Lewis Truck Parts & Equipment, Inc. ("JML") and Steven Lewis, pursuant to the False Claims Act." (App. 26).

In May of 1992, Hall and Phillips entered into another agreement with TAF. This contract, which superseded the 1988 agreement, provided that Hall & Phillips would receive at least a 50% contingency fee in each of TAF's False Claims Act cases. However, the parties further agreed that a specific contingency fee could be agreed upon by the parties in connection with any particular lawsuit. For the Lewis lawsuit, TAF agreed to pay Hall & Phillips two-thirds of TAF's share of any recovery. This contract superseded the 50% provision in the May, 1992 agreement. (App. 22-23). Thus, after TAF was dismissed from the case as a party, Hall & Phillips

nonetheless required TAF to *increase* the contingent fee Hall & Phillips would receive.

During the course of the attorneys' fees litigation, Lewis discovered the fee arrangements between Virani, Hall & Phillips, and TAF, and argued that the statutory attorneys' fee award should not include any fee incurred in conduct which was fraudulent or unethical. The District Court rejected Lewis' argument. (App. 23).

At that time, however, as the District Court stated, the Court was unaware of any dispute between the plaintiff and his attorneys regarding the fee arrangements. In fact, the Court noted, at a hearing before the Magistrate Judge, John Phillips of Hall & Phillips represented to the Court that Mr. Virani was "fully aware, Your Honor, and supports the fee arrangements. There's no dispute here with Mr. Virani." *Id.*

At the conclusion of the fee litigation, the Court awarded $316,500 in fees. Defendants filed a timely Notice of Appeal in connection with the fee award. However, before the appeal was briefed, defendants reached a settlement with Hall & Phillips which permitted defendants to pay the attorneys' fees on an installment basis. (App. 24). Believing that Mr. Virani's approval of the settlement was necessary, and after Hall & Phillips had assured Lewis that Virani would in fact approve it, defendants dropped the appeal. When Lewis executed a settlement agreement with Hall & Phillips, Virani refused to sign. *Id.*

Virani subsequently retained new counsel, claiming that he was unaware of the arrangements between TAF and Hall & Phillips, and claiming an interest in both the

attorneys' fees and TAF's share of the settlement proceeds.[1] Unsure of whether the fees should be paid to Virani or Hall & Phillips, Lewis filed a Motion with the District Court to determine to whom the fee should be paid (App. 24). Virani joined this Motion. In addition, the Government filed a Motion for Declaration of rights in connection with the settlement proceeds. *Id.*

Following briefing by all parties, the District Court awarded Virani the relator's share of the proceeds of the case, stating:

> Indeed, because TAF is no longer a plaintiff, the agreement between TAF and Virani is merely a private contract in which Virani apparently agreed to give TAF a share of his recovery in exchange for TAF's agreement to advance litigation expenses. The Court approved a settlement agreement between the Government and the defendants, and subsequently determined that Virani was entitled to 20% of that settlement. Thus . . . the Government must pay 20% of that settlement to Virani. Whether Virani must now pay a percentage of his share to TAF is an issue to be resolved by TAF and Virani in a separate action. (App. 26-27).

That portion of the District Court's order was not appealed to the Ninth Circuit.

The District Court awarded the statutory attorneys' fees to Virani. The Ninth Circuit reversed that portion of

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[1] More than a year had passed without Hall & Phillips making any effort to enforce the award of attorneys' fees against Lewis.

the District Court's Order and ordered the attorneys' fees to be paid to Hall & Phillips.

Both courts below rejected Lewis' argument that the award of reasonable attorneys' fees under the False Claims Act could not as a matter of law include any amount which reflected fees incurred in attempting to improperly obtain (1) a percentage of Virani's portion of the *qui tam* settlement for TAF or (2) fees for acts by Hall & Phillips which otherwise defrauded Virani or the Court.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED IN INTERPRETING AND APPLYING THE REASONABLE ATTORNEYS' FEES PROVISION OF THE FALSE CLAIMS ACT.

Section 2730(d)(1) of the False Claims Act provides that a successful *qui tam* plaintiff "shall also receive . . . reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(1). Even though the language is mandatory in nature, that statute's fee provision plainly provides for an award only of "reasonable" attorneys' fees.

The statute, however, is silent as to what is a "reasonable" fee. A review of the statute's legislative history reveals no clear indication of any intent by Congress for the courts to ignore fundamental equitable concepts of reasonableness when making fee awards under Section 3730(d)(1). Nor, however, is any legislative intent expressed suggesting that courts award attorneys' fees regardless of the totality of the circumstances bearing on

whether such fees are, in fact, reasonable. There can be no question, however, that fees first must be deemed "reasonable" by the court before the False Claims Act authorizes the court to grant a fees award.

The Sixth and Ninth Circuit are the only two Circuits to have addressed the application of the reasonable attorneys' fees provision of the False Claims Act in the context of allegations of improprieties in the attorney-client fee arrangements. The Sixth Circuit, unlike the Ninth, held in *United States ex rel. Taxpayers Against Fraud and Walsh v. General Electric Company*, 41 F.3d 1032, 1044-45 (6th Cir. 1994) that issues of impropriety raised by the attorney-client fee arrangement should be examined by the District Court and taken into account in determining a reasonable attorneys' fee under the False Claims Act.

In *General Electric*, Hall & Phillips, acting as counsel for both the *qui tam* relator, Chester Walsh ("Walsh"), and TAF, entered into a fee agreement with Walsh, whereby Hall & Phillips was entitled by express provision to receive both the entire statutory attorneys' fees awarded *and* a 25% contingency fee from Walsh. The case was later settled and Hall & Phillips was awarded statutory attorneys' fees by the District Court. General Electric appealed the fee award arguing that the amount of reasonable attorneys' fees should be reduced to account for the plaintiff's deliberate delay in filing the suit for purposes of increasing the bounty and attorneys' fees. 41 F.3d at 1043. During the briefing and argument on the issue, the subject of Hall & Phillips' fee agreements and incestuous relationship with TAF were brought to the court's attention. At no time however, did Hall & Phillips' client,

Walsh, raise any issue as to improprieties in his fee agreements with Hall & Phillips.

In response to General Electric's allegation that TAF was only a front for Hall & Phillips, the Sixth Circuit noted that TAF "concedes that 95% of its expenses have been incurred as legal fees to Hall & Phillips, and it was founded substantially by John R. Phillips." *Id.* at 1039. The court then held that the record contained insufficient information upon which to determine the reasonableness of the attorneys' fees awarded to Hall & Phillips, specifically instructing the district court to determine whether "there [are] any ethical considerations in the relationship between TAF and the Phillips firm that should reflect TAF's portion of the attorneys' fee award." *Id* at 1044. Most significantly, the Circuit Court instructed that:

> [i]n addition, the judge should broaden his inquiry into the role that TAF played in this litigation . . . Second, the judge should investigate whether Hall & Phillips's relationship with TAF violated ethical canons. See Model Rules of Professional Conduct 1.8(j) (prohibiting lawyer from acquiring proprietary interest in subject matter of litigation). The judge should determine whether TAF's involvement as a co-plaintiff is tantamount to participation by Hall & Phillips as a plaintiff in the case. If TAF is in fact a front for Hall & Phillips as well as a co-plaintiff in the case, then the ethical mandates of Rule 1.8(j) have been implicated. Third, the judge should determine the validity of the contracts involving Walsh, TAF, and Hall & Phillips. If the contracts fail for lack of consideration or other reasons, *the judge should make appropriate*

> *findings modifying the division of the bounty and the contingency fees among the parties.*

Id. at 1044-45 (emphasis added).[2]

The facts of the present case strongly support the adoption and application of this Sixth Circuit rule in the Ninth Circuit. Unlike the present case, the client in *General Electric* was not challenging the propriety of TAF's involvement or the fee arrangements between TAF and Hall & Phillips. Thus, here, where Virani (the deceived client) has raised allegations of his attorneys' fraud, the scrutiny mandated by the Sixth Circuit is even more compelling than in *General Electric*. Here, in direct contradiction to the statements made by John Phillips to the Magistrate Judge at oral argument on the *Virani* attorneys' fees motion that Virani "fully understood" and "supports the fee arrangements," Virani submitted a signed declaration to the District Court stating that he was unaware of the relationship and fee arrangements between Hall & Phillips and TAF. (App. 23-24)[3] Moreover, General Electric's appeal of the fee award was based primarily on allegations of improper delay in filing the *qui tam* suit, with only minimal allegations of unethical conduct resulting from the relationship between Hall & Phillips and TAF. The Sixth Circuit, however, (and virtually *sua sponte*), correctly saw the significant ethical

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[2] Following remand, Hall & Phillips settled the *General Electric* case before the District Court issued any opinion on the issues raised by the Sixth Circuit.

[3] John Phillips characterized in the District Court the fee agreements in the *General Electric* case as "identical in structure" to those at issue here.

implications of the relationship between Hall & Phillips and TAF and directed the district court to inquire into said relationship when determining the amount of reasonable attorneys' fees. 41 F.3d at 1044-45.[4]

In this case, the Ninth Circuit affirmed the District Court's order which declined to examine the allegations of fraud and unethical conduct against Hall & Phillips. The District Court noted, however that its decision was in conflict with that of the Sixth Circuit:

> In so holding, this Court obviously disagrees with *United States ex rel. Taxpayers Against Fraud v. General Electric*, 41 F.3d 1032 (6th Cir. 1994), in which the Sixth Circuit remanded to the District Court for consideration of many of the issues raised by Virani and the defendants. *General Electric*, however, is not binding on this Court. (App. 36)

The Ninth Circuit, in affirming the District Court's order, recognized that

> "It is possible that some aspect of the fee agreements between Virani and HP were not entirely proper. See United States ex rel Taxpayers Against Fraud v. General Electric, 41 F.3d 1032, 1043-49 (6th Cir. 1994). We express no opinion on that head." (App. 12)

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[4] At no time during their representation of Virani did Hall & Phillips submit a declaration of Virani attesting to his knowledge and support of the fee arrangements. Virani did not attend any hearing concerning Lewis' allegations of impropriety by Hall & Phillips.

II. THE AWARD OF ATTORNEYS' FEES IN THIS CASE COMPENSATED HALL & PHILLIPS FOR FRAUDULENT CONDUCT

The Ninth Circuit reasoned that because Hall & Phillips was entitled to receive some fee under California law, even if some impropriety existed in the fee arrangements, there was no need to decide whether there in fact were any improprieties. The Court stated:

> We do not explore those issues because they come to no more than an assertion that HP handled its fee arrangement in a way that might have the taint of some impropriety. When that kind of claim has been made, California courts have not denied fees in their entirety. . . . In light of California law, even if there were some impropriety in the fee arrangement between HP and Virani, Lewis cannot prevail. HP would still be entitled to recover the reasonable value of its services, and that is all Lewis has been required to pay. (App. 14)

By so holding, the Ninth Circuit failed to address petitioners' claim that under federal law, specifically the False Claims Act, reasonable attorneys' fees do not include fees for perpetuating a fraud on the client or the Court.[5] In this case, an inquiry in the District Court into the allegations against Hall & Phillips would have shown

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[5] The Court also begs the question of reasonableness under Certification law by *presuming* that the fees Lewis was ordered to pay are "reasonable". The Court's all or nothing approach to California law is also flawed: The Court cited no case under California law which awarded as reasonable any fees for acts in furtherance of a fraud.

that the fees awarded to Hall & Phillips compensated Hall & Phillips, for example, for the time spent in attempting to retain a portion of Virani's share of the settlement proceeds for TAF, after TAF was dismissed from the case, thus circumventing the Court's exclusive jurisdiction to determine whether TAF was entitled to *any* portion of the settlement proceeds.

By withdrawing and entering into a new fee agreement with Virani to share such award, Hall & Phillips sought to deprive the District Court of its exclusive jurisdiction to determine whether any portion of the government's recovery in the case should be awarded to TAF. 31 U.S.C. § 3730(d)(1) ("**Award to Qui Tam Plaintiff.** – . . . where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, audit or investigation, or from the news media, **the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation . . . "**) (emphasis added). In this case, TAF provided no information and played no role in advancing this case to litigation.

Hall & Phillips was also compensated by the District Court's reasonable fee award for the time Hall & Phillips spent drafting the agreements whereby Virani was defrauded into sharing his portion of the settlement proceeds with TAF even though TAF's sole purpose in the litigation was to serve as a front for Hall & Phillips so

that Hall & Phillips could receive a contingent fee which violated Hall & Phillips' no fee agreement with Virani.

The time charges for the foregoing acts were included in the application for reasonable attorneys' fees which Hall & Phillips submitted to the District Court and were among the charges approved by the Court.

In short, by refusing to examine the ethical issues raised by Virani and petitioners, the courts below awarded sums to Hall & Phillips as "reasonable" attorneys' fees which were earned not by prosecuting the *qui tam* action on behalf of the United States but by which were earned by attempting to defraud the client and the Court. Lewis is obligated only to pay a "reasonable" fee. To the extent that H&P engaged in fraudulent and unethical conduct vis-a-vis Virani and the court to improperly inflate the fees it sought pursuant to the statute, then such fees are *per se* unreasonable.[6]

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[6] Lewis obviously is not seeking to avoid the payment of a reasonable fee. He is seeking only to avoid paying for the fees associated with particular unethical or fraudulent conduct by Hall & Phillips.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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UNITED STATES of America ex rel. Alnoor VIRANI, Plaintiff-Appellee,
v.
JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; Steven Lewis; Robert Holtzman, Defendants,
and
Hall & Phillips, Appellants.
UNITED STATES of America ex rel. Alnoor VIRANI, Plaintiff-Appellee,
v.
Steven H. LEWIS; Jerry M. Lewis Truck Parts & Equipment,
Inc.; Robert Holtzman, Defendants-Appellants.

Nos. 95-56396, 95-56456.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted June 3, 1996.
Decided July 10, 1996.

In *qui tam* action brought under False Claims Act, the United States District Court for the Central District of California, William Duffy Keller, J., required defendant to pay statutory attorney fees to qui tam relator, rather than directly to law firm that represented relator, and denied defendant's request to reconsider amount of fee. Cross-appeals were taken. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) client's request of attorney fees created right in attorney to receive fee, and (2) any impropriety in fee arrangement between attorney and client did not affect amount defendant was obligated to pay.

Reversed and remanded in part and affirmed in part.

Thomas, Circuit Judge, filed concurring opinion.

Phillip R. Benson, Newport Beach, California, for plaintiff-appellee.

Fred D. Heather, Troop, Meisinger, Steuber & Pasich, LLP, Los Angeles, California, and Susan B. Myers, McKenna & Cuneo, LLP, Los Angeles, California, for defendants Jerry M. Lewis Truck Parts & Equipment, Inc., and Steven H. Lewis.

Appeals from the United States District Court for the Central District of California, William D. Keller, District Judge, Presiding. D.C. No. CV-89-01302-WDK-Ex.

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

FERNANDEZ, Circuit Judge:

The law firm of Hall & Phillips (HP) appeals the district court's order which required Jerry M. Lewis Truck Parts & Equipment, Inc. (Lewis), the defendant in a *qui tam* suit, to pay statutory attorneys' fees to Alnoor Virani, the *qui tam* relator, rather than directly to HP. The law firm was Virani's attorney in the *qui tam* action. At the same time, Lewis appeals the district court's refusal to reconsider the amount of the attorneys' fees award because Lewis contends that improper fee arrangements made the attorneys' fees unreasonable. We reverse the district court's order that the attorneys' fees be paid directly to the *qui tam* relator rather than directly to the attorneys, but we affirm the district court's denial of Lewis's motion for reconsideration.

STATEMENT OF THE CASE

In February 1989, Virani retained HP to represent him in a *qui tam* action against Lewis under the False Claims Act (FCA). 31 U.S.C. Secs. 3729-3732. The retainer agreement provided that Virani would not pay HP for legal services in connection with the Lewis litigation. The agreement, however, did reserve HP's right to seek court-awarded costs, expenses, and attorneys' fees from Lewis. The agreement further assigned to HP all monetary amounts awarded as costs, expenses or attorneys' fees and provided that HP would have the "ultimate authority concerning the conduct of this litigation, including decisions such as whether to continue to prosecute the case and the terms of any settlement."

On the same day, Virani also entered into an agreement with the Taxpayers Against Fraud (TAF). That agreement bound the parties to act as co-plaintiffs in the Lewis case. TAF agreed to pay the litigation expenses while Virani promised that TAF would receive 40% of any recovery awarded by the court. The agreement further provided that any percentage of the recovery that TAF adjudged to be necessary to pay to counsel would come exclusively out of TAF's share. Some months earlier, in September 1988, TAF had entered into an agreement with HP whereby TAF agreed to pay HP two-thirds of its hourly rate in addition to half of any damages received by TAF in FCA cases. HP had agreed to represent TAF in several FCA cases already in progress and in future FCA cases. Virani claims to have had no knowledge of the agreement between TAF and HP.

In December of 1990, TAF withdrew from this litigation, but before it withdrew it entered into a second agreement with Virani which reaffirmed Virani's obligation to pay 40% of any award to it. In May 1992, TAF entered into a second agreement with HP which superceded the September 1988 agreement. TAF agreed to pay at least a 50% contingency fee in each of TAF's FCA cases. However, the parties also agreed that specific arrangements could be made for any particular lawsuit, and TAF agreed to pay a two-thirds contingency fee in the Lewis litigation.

Virani and Lewis settled the underlying *qui tam* action, and the court awarded $316,500 in statutory attorneys' fees. During the attorneys' fee litigation, Lewis discovered the arrangements between Virani, HP, and TAF. Lewis asserted that because the fee arrangements were "fraudulent and unconscionable," the statutory attorneys' fee should be lowered. The district court, however, adopted the Report and Recommendation of the Magistrate Judge and rejected Lewis's argument.

After the court awarded the statutory fees, Virani claimed that he was entitled to personally receive the fees because he was unaware of the arrangement between HP and TAF. The district court agreed. It concluded that Virani was entitled to collect the fees himself and determined that it had not retained jurisdiction to determine how the fee ought to be allocated under the fee agreements between HP and Virani. In effect, it allowed Virani to keep the fees, unless HP could successfully obtain them from him in another action.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. Sec. 1331 and 31 U.S.C. Sec. 3732(a). We have jurisdiction pursuant to 28 U.S.C. Sec. 1291.

"We generally review fee awards for an abuse of discretion." Haworth v. Nevada, 56 F.3d 1048, 1051 (9th Cir.1995); Franklin Fin. v. Resolution Trust Corp., 53 F.3d 268, 273 (9th Cir.1995). However, we review the supporting findings of fact for clear error, but review whether the district court applied the correct legal standard de novo. Price v. Seydel, 961 F.2d 1470, 1475 (9th Cir.1992); *see also* Parents of Student W v. Puyallup School Dist., No. 3, 31 F.3d 1489, 1498 (9th Cir.1994). Also, we review any element of statutory interpretation involved in the district court's decision de novo. *See* Haworth, 56 F.3d at 1051. We review a district court's determination that it lacks subject matter jurisdiction de novo. *See* Seven Resorts, Inc. v. Cantlen, 57 F.3d 771, 772 (9th Cir.1995); Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir.1995).

DISCUSSION

A. *Entitlement to Receipt of Fees.*

The relationships between Virani, HP, and TAF have generated an issue that courts are rarely required to focus upon. As do many other statutes, the False Claims Act provides for an award of fees to successful plaintiffs. It states, in pertinent part: "Any such person shall also receive an amount or reasonable expenses which the court finds to have been necessarily incurred, plus

reasonable attorneys' fees and costs." 31 U.S.C. Sec. 3730(d)(1). On its face this seems to say that the plaintiff can recover the attorneys' fee for himself. What then of the attorney? Are not the fees for his services and should not he, if anyone, receive them? It is usually assumed that the answer to the latter question is "Yes, of course, how could it be otherwise." That assumption simply tends to be in the background of decision making about fees. "Yet there are times when someone will ask that a usually unacknowledged part of the background be brought to the forefront and perused before it recedes again into relative obscurity." Larson v. Neimi, 9 F.3d 1397, 1402 (9th Cir.1993). This is one of those cases.

What makes the issue most interesting is that at first blush it appears to present us with a conundrum: if the attorney is entitled to the fee, how can it be that he has no right to ask for it, and if the client has the right to ask for it, how can it be that he has no right to keep it? The answer was suggested by Hohfeld, for as he said, "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of language is occasionally recognized by the authorities." Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30 (1913). So it is here. The client's right is really a power to obtain fees for his attorney; the attorneys' right does not come into being until the client exercises that power; the defendant's liability will only arise if that power is exercised. But we are a little ahead of ourselves and will now outline the authorities which appear to create the conundrum in the first place.

The Supreme Court has made it clear that, in general, statutes bestow fees upon parties, not upon attorneys. Evans v. Jeff D., 475 U.S. 717, 731-33, 106 S.Ct. 1531, 1539-40, 89 L.Ed.2d 747 (1986). Those fees can, therefore, be waived by the party himself. Id. As the Court has said, "just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that as far as [42 U.S.C. Sec. 1988] is concerned, it is the party's right to waive, settle, or negotiate that eligibility." Venegas v. Mitchell, 495 U.S. 82, 88, 110 S.Ct. 1679, 1683, 109 L.Ed.2d 74 (1990). Thus, the attorney remains at the mercy of the client, who can either demand attorneys' fees from the defendant, or not, as he chooses. If the client chooses not to ask for the fees, the attorney has no standing to request them. *See* Willard v. City of Los Angeles, 803 F.2d 526, 527 (9th Cir.1986); *see also* Freeman v. B & B Assocs., 790 F.2d 145, 149 (D.C.Cir.1986). Of course, the attorney cannot then look to the defendant for payment.

On the other hand, weighty authority demonstrates that the client himself is not entitled to keep the fees which are measured by and paid on account of the attorneys' services. The plaintiff cannot collect fees at all unless there is a true attorney-client relationship. That is even true when the plaintiff *is* an attorney. Kay v. Ehrler, 499 U.S. 432, 435-437, 111 S.Ct. 1435, 1437, 113 L.Ed.2d 486 (1991). The mere fact that the attorneys' labor, even reasonable and skilled labor, is expended on the cause does not entitle the plaintiff-attorney to a fee. Id. at 437-38, 111 S.Ct. at 1438. The plaintiff has no power to confer the fee upon himself.

On the other side of the coin is the litigating organization, which, in a sense, may represent itself by the use of in-house counsel. It is separate from its attorneys, and it does have the power to obtain attorneys' fees for their services. Id. at 436 n. 7, 111 S.Ct. at 1437 n. 7. And when an individual is represented by a litigating organization, we have declared that "the award should be made directly to the organization providing the services to ensure against a windfall to the litigant." Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir.1974). Litigating organizations are, in that sense, the providers of the legal services. *See* id. They "stand[ ] in the same position as a private attorney to whom a fee is owed." Hairston v. R & R Apartments, 510 F.2d 1090, 1093 (7th Cir.1975). Thus, "fee awards must accrue to counsel." Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3d Cir.1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). And "the grant of fees should go directly to the organization providing the services." Hairston, 510 F.2d at 1093. *Cf.* Serrano v. Priest, 20 Cal.3d 25, 47 n. 21, 569 P.2d 1303, 1315 n. 21, 141 Cal.Rptr. 315, 327 n. 21 (1977) (award of fees directly to attorneys "no longer questioned in federal courts").

All of this means that even if an attorney is willing to agree to work on a case for less than a reasonable fee, he will be entitled to a reasonable fee when the client asks that the fee be awarded out of the defendant's pocket. *See* Quesada v. Thomason, 850 F.2d 537, 543 (9th Cir.1988). That creates no windfall for the attorney because he will merely receive "a reasonable hourly fee for all hours reasonably spent." Id. And it creates no windfall for clients because "statutory awards in excess of private fee

agreements . . . should be used to compensate the attorney in full." Id.; *see also* Phillips v. General Servs. Admin., 924 F.2d 1577, 1582-83 (Fed.Cir.1991) (to be incurred there must be agreement that the fee will be paid over to attorney).

These concepts were tested in a truth-in-lending case where the statute provided that a creditor who did not make proper disclosure was liable to the wronged person in an amount equal to, among other sums, " 'a reasonable attorney's fee. . . . ' " Plant v. Blazer Fin. Servs., Inc., 598 F.2d 1357, 1365 (5th Cir.1979). The losing creditor claimed a right to set off the amount that it was owed by the plaintiff against the attorneys' fee that was awarded to the plaintiff. The court did not agree. It was not moved by the argument that the fee was "nominally" awarded to the plaintiff. As it held, "the fee once awarded becomes in effect an asset of the attorney, not the client." Id. at 1366; *see also* Freeman, 790 F.2d at 150. In other words, the fee is for the attorney and the attorney should receive it.

In the *qui tam* arena, it is even more clear that attorneys' fees must go to the attorneys rather than to the plaintiff. If they did not, a wrong would be perpetrated upon the government. *See United States ex* rel. Gibeault v. Texas Instruments Corp., 25 F.3d 725 (9th Cir.1994). If the amount went to the plaintiff, it would be a compensatory payment which really belongs to the United States subject to allocation of a portion to the plaintiff. Id. at 728. As we have said:

> [T]he government claims the $300,000 payment for attorneys' fees is really a settlement under the False Claims Act that is structured as attorneys' fees. Such an allocation of the settlement

> proceeds would contravene the requirements of Sec. 3730(d)(2), which guarantees the government a substantial portion of any False Claims Act settlement.
>
> . . . .
>
> . . . Thus, the government has a genuine concern as to whether the amount labelled attorneys' fees actually represents in part a payment to the *qui tam* plaintiff.
>
> Id.

With the above, the statement of the riddle is complete. How can it be that the one who may be entitled to actually receive any fee has no right to ask for it, but the one who has the right to ask for the fee is not entitled to actually receive it? Again, the answer is found in the characterization of the plaintiff's right as a power. "To have a power is to have the ability to make another person have or cease to have rights of one kind or another." Judith Jarvis Thomson, *The Realm of Rights* 59 (1990); *see also* Hohfeld, 23 Yale L.J. at 44-49. We are all familiar with powers of appointment where the holder can direct that assets be paid from "A" (usually a trust fund) to "B." Until that power is exercised, "B" has no right to the assets, and "A" has no duty to give them to him.

Similarly, in this area only the plaintiff has the power to demand that the defendant pay the fees of the plaintiff's attorney.[1] Unless and until the plaintiff exercises that power, no one has the right to collect fees from the

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[1] Of course, we recognize that it is not quite that simple. The court must make the order, and the defendant can contest it. Yet, the principle remains the same.

defendant, and the defendant has no duty to pay them. Once the power is exercised, however, the attorneys' right vests, and the defendant's duty becomes fixed. *Compare* Phillips, 924 F.2d at 1583 (no fee is "incurred" for fee award purposes unless there is an express or implied agreement that they will be paid to the attorney). The work was done by and the fees are for the plaintiff's attorney. They must be directed to the attorney. Were the rule otherwise, plaintiffs would obtain possession of fee awards, and attorneys would be left to attempt to obtain the money paid for their services as best they could. Left to the normal vicissitudes of life, substantial sums would be diverted from their intended purpose. Actions of the client or of the client's creditors (or heirs) would often intervene. That would not only thwart the Congressional purpose but would also make no sense at all and would lead to unconscionable results.

This case is determined by a straightforward application of these principles. Virani paid no fees to HP, but he did exercise his power to request that fees be paid in an amount calculated on the value of HP's labor. The district court awarded those fees, and HP acquired the right to receive them from Lewis. The district court erred when it decided that the fees must be paid to Virani himself and left it up to HP to see if it could recover the fees from him. Under no condition was Virani entitled to receive direct payment of those fees from Lewis. If HP did not earn them, Lewis should not have to pay them at all; if HP did earn them, Lewis must pay them to HP.[2] That brings us to Lewis's claims.

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[2] We do not opine on any other disputes which Virani might have with HP or TAF.

B. *Reasonableness of Fees.*

Lewis asserts that HP did not treat Virani ethically, so the fees it was ordered to pay cannot have been reasonable. The district court did not address the issue. It failed to do so because it was of the opinion that fee disputes were entirely between the attorney and the client and had nothing at all to do with the defendant. That determination was the almost inevitable result of the district court's decision that the plaintiff can personally receive the fee and can then attempt to keep it for himself. In that the district court erred because the statute only requires Lewis to pay a reasonable attorneys' fee, and the question here must be: What *is* a reasonable attorneys' fee?

Lewis contends that California law provides that the attorney cannot recover anything at all if an ethical violation is shown. It is possible that some aspects of the fee arrangements between Virani and HP were not entirely proper. *See* United States ex rel. Taxpayers Against Fraud v. General Elec. Co., 41 F.3d 1032, 1043-49 (6th Cir.1994). We express no opinion on that head. However, under the facts of this case Lewis's assertions are not supported by California law. Thus, the district court reached the correct result when it refused to revisit its determination that the fee awarded for services rendered in the *qui tam* action was reasonable.

California courts have often held that when the ethical violation in question is a conflict of interest between the attorney and the client (or between the attorney and a former client), the appropriate fee for the attorney is zero. At least that is true when the violation is one that pervades the whole relationship. *See, e.g.*, Clark v. Millsap,

197 Cal. 765, 785, 242 P. 918, 926 (1926) (relationship permeated with fraud after gaining control of client's assets; no attorneys' fee proper); Day v. Rosenthal, 170 Cal.App.3d 1125, 1162, 217 Cal.Rptr. 89, 113 (1985) (no finding on reasonable value of attorneys' services necessary because conflict of interest rendered services valueless), *cert. denied*, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986); Jeffry v. Pounds, 67 Cal.App.3d 6, 12, 136 Cal.Rptr. 373, 377 (1977) (law firm entitled to compensation only for services it rendered prior to its breach of professional conduct by accepting representation of client's wife in marital dispute without the client's consent); Goldstein v. Lees, 46 Cal.App.3d 614, 617-18, 120 Cal.Rptr. 253, 254-55 (1975) (attorney who undertook to represent a client in a proxy fight with a corporation for which the attorney had been general counsel could not recover any fees); Conservatorship of Chilton, 8 Cal.App.3d 34, 43, 86 Cal.Rptr. 860, 866 (1970) (in case of a clear conflict of interest, there was no error when the trial court found no value in the services rendered); *see also* Asbestos Claims Facility v. Berry & Berry, 219 Cal.App.3d 9, 26-27, 267 Cal.Rptr. 896, 906-07 (1990) (one of the methods by which the issue of attorney's conflict of interest may be raised is as a defense in the attorney's action to recover fees).

However, there is no hint in this case that there was any conflict of interest whatever. Nor was there any suggestion that HP did not perform valuable services for Virani or that anything is amiss in the calculation of the reasonable amount of fees for those services. The objection made here is that in the formation of the attorney-client relationship HP arranged matters in a way which

could ultimately bring it more than a reasonable fee. It is also argued that Virani did not know that. We do not explore those issues because they come to no more than an assertion that HP handled its fee arrangement in a way that might have the taint of some impropriety. When that kind of claim has been made, California courts have not denied fees in their entirety. They have simply refused to enforce the improper agreement itself. Nevertheless, attorneys were still allowed to recover the reasonable value of their services. *See, e.g.*, Calvert v. Stoner, 33 Cal.2d 97, 105, 199 P.2d 297, 301 (1948) (*quantum meruit* allowed even if fee arrangement were void as violative of public policy); Rosenberg v. Lawrence, 10 Cal.2d 590, 594, 75 P.2d 1082, 1084 (assuming the express contract for fees was void because of attorney misconduct in splitting the fee with a non-attorney *quantum meruit* allowed); *cf.* Fracasse v. Brent, 6 Cal.3d 784, 791, 494 P.2d 9, 13, 100 Cal.Rptr. 385, 389 (1972) (attorney entitled to payment for reasonable value of services rendered before his discharge by client, despite written fee contract); Ayres v. Lipschutz, 68 Cal.App. 134, 138, 228 P. 720, 720-21 (1924) (same).

In light of California law, even if there were some impropriety in the fee arrangement between HP and Virani, Lewis cannot prevail. HP would still be entitled to recover the reasonable value of its services, and that is all Lewis has been required to pay. We appreciate Lewis's concern that Virani be treated fairly when attorneys enter into fee arrangements with him, but, again, that does not affect the amount of the fee which it must pay.

CONCLUSION

HP rendered valuable services in a *qui tam* action against Lewis, and the court awarded a reasonable attorneys' fee for those services. After Virani exercised his power to have the fee assessed against Lewis, he decided that he would like to receive the fee himself. He cannot; the fee must go to HP. Lewis would like to ward off its duty to pay the fee by taking advantage of the falling out between Virani and HP. It cannot; the fee must go to HP. In fine, Virani's exercise of his power has created a right in HP to receive the fee and a corresponding duty in Lewis to pay it.

REVERSED and REMANDED, with directions to enter judgment directing payment of the fee to HP (No. 95-56396). AFFIRMED (No. 95-56456).

THOMAS, Circuit Judge, concurring.

I concur with the result in this case, but differ slightly from the majority's statutory interpretation. The majority holds that the False Claims Act requires payment of court-awarded attorneys' fees directly to the attorney. I would hold that, absent a contractual assignment to the attorney, the False Claims Act requires payment of the attorneys' fee award to the party, with the ultimate disposition of the award dependent upon the contract between the attorney and client. Here, I have absolutely no conflict with the result because Virani assigned his right to court-awarded attorneys' fees to his lawyers.

However, a brief comment on the statutory analysis is warranted. On its face, the False Claims Act provides that payment of attorneys' fees should be made directly

to the qui tam plaintiff. Referring to the qui tam plaintiff, 31 U.S.C. Sec. 3730(d)(1) provides:

> Any such *person* shall also *receive* an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs.
>
> (emphasis added).

This result is consistent with the general proposition, noted by the majority, that federal fee-shifting statutes confer fee awards upon parties, not attorneys. Evans v. Jeff D., 475 U.S. 717, 730-32, 106 S.Ct. 1531, 1539-40, 89 L.Ed.2d 747 (1986). A party may waive statutorily authorized fees over the objection of his or her attorney. Id. Indeed, an attorney does not have standing to request statutory fees. Willard v. City of Los Angeles, 803 F.2d 526, 527 (9th Cir.1986).

The majority interprets this to mean that a client has a discretionary power to obtain a fee award. In the case of fee-shifting statutes, the majority concludes that if that power is exercised, the fee award must be paid directly to the attorney. The implication seems to be that the attorney has a vested right in the fee award and the client acts only as a vehicle through which the attorney may obtain a court-awarded fee.

In my opinion, this interpretation does not square with a plain reading of the False Claims Act, nor with general case law concerning federal fee-shifting statutes. The clear import of case law is that (1) statutory attorneys' fee awards are bestowed upon the party, not the attorney and (2) such awards are separate and distinct from the contractual relationship between the attorney

and client.[1] Under fee-shifting statutes, a court must determine the reasonable compensation to be paid by the defendant for the time and effort expended by the prevailing party's attorney, "no more and no less." Blanchard v. Bergeron, 489 U.S. 87, 93, 109 S.Ct. 939, 944, 103 L.Ed.2d 67 (1989). The fee-shifting statute "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." Venegas v. Mitchell, 495 U.S. 82, 90, 110 S.Ct. 1679, 1684, 109 L.Ed.2d 74 (1990). Thus, the fee award may bear no relation to the actual fee paid by the prevailing party to his or her attorney. "What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order." Id. Consistent with precedent concerning other fee-shifting statutes, I do not believe the False Claims Act interferes with the contractual relations between attorney and client. Id. at 87, 110 S.Ct. at 1682-83 ("We have never held that Sec. 1988 constrains the freedom of the civil rights plaintiff to become contractually and personally bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to the plaintiff.").

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[1] Of course, fees must be "incurred" in order for the plaintiff to be eligible for compensation. In order to be "incurred" within the meaning of a fee-shifting statute, there must be an express or implied agreement that fees will be paid to a legal representative. Phillips v. General Services Admin., 924 F.2d 1577, 1582-83 (Fed.Cir.1991). Thus, a pro se plaintiff is not entitled to a fee award. Kay v. Ehrler, 499 U.S. 432, 435-37, 111 S.Ct. 1435, 1436-38, 113 L.Ed.2d 486 (1991).

The analogy to the law of powers is consistent with this conclusion. A power over property is defined as a liberty or authority reserved by, or limited to, a person to dispose of real or personal property for his or her own benefit or the benefit of others. Henderson v. Rogan, 159 F.2d 855, 857 (9th Cir.), *cert. denied*, 331 U.S. 843, 67 S.Ct. 1534, 91 L.Ed. 1864 (1947). A power is "general" if it is capable of being exercised in favor of anyone, including the holder. A power is "special" if its exercise is restricted by the creating document to a designated class of persons other than the holder of the power. *See* Paxton v. Commissioner of Internal Revenue, 520 F.2d 923, 927-28 (9th Cir.), *cert. denied*, 423 U.S. 1016, 96 S.Ct. 450, 46 L.Ed.2d 388 (1975) (discussing powers of appointment); Shedd v. Commissioner of Internal Revenue, 237 F.2d 345, 349 (9th Cir.), *cert. denied*, 352 U.S. 1024, 77 S.Ct. 590, 1 L.Ed.2d 596 (1957) (same). The majority seems to analogize the False Claims Act fee provisions to the creation of a special power. Because the governing fee agreement in this case contains restrictions, I agree. However, the majority implies that this theory ought to apply in every case regardless of the provisions of the attorney-client contract. In my view, the more appropriate analogy is to that of a general power which would give the client control over the property unless restricted by contract. This reasoning is consistent with the False Claims Act and general case law concerning federal fee-shifting statutes.

With this difference noted, I concur.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 89-1302-WDK **Date** August 25, 1995

Title UNITED STATES OF AMERICA, *ex rel.* ALNOOR VIRANI v. JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC. *et al.*

DOCKET ENTRY

PRESENT:

HON. WILLIAM D. KELLER, **JUDGE**

Sara Tse	None Present
Deputy Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None Present	None Present

PROCEEDINGS:

Before the Court is a Motion for Order Setting a Status Conference or Briefing Schedule in Connection with the Court's Order Awarding Statutory Attorney's Fees and Request for Leave to File a Request for Sanctions. In the underlying *qui tam* action, settled by the parties over two years ago, the Court awarded $316,500 in statutory attorneys' fees. (Order Adopting Findings and Recommendations of United States Magistrate Judge, dated July 23, 1993). Since that time, a dispute has arisen between plaintiff Alnoor Virani and his former counsel, Hall & Phillips, regarding the distribution of the underlying settlement and the statutory attorneys' fees.

FACTUAL BACKGROUND

In February of 1989, Alnoor Virani retained the law firm of Hall & Phillips to represent him in a *qui tam* action against defendants Jerry M. Lewis Truck Parts & Equipment, Inc., Steven Lewis, and Robert Holtzman ("Lewis"). Among other things, the retainer agreement between Virani and Hall & Phillips provided as follows:

> It is understood that no professional fees, costs or expenses will be charged by the attorneys for the services rendered to the client [in connection with the Lewis litigation]. It is understood, however, that the attorneys reserve the right to seek a court award of costs, expenses and attorneys' fees from the opposing parties that is separate and apart from any percentage claim the client may be entitled to from the recovery to the United States Treasury. The client hereby assigns the attorneys any amounts for costs, expenses, and attorneys' fees for work on the case awarded by the court or agreed to by the parties. Under no circumstances will the client oppose, or assist in opposing, any such request for attorneys' fees made by the attorneys nor will he contest or dispute the amount of fees requested thereby.

(*See* Benson Decl., Exhibit C). Under the retainer agreement, Virani also waived his rights with respect to control over the litigation, including the right to accept or reject any settlement agreement. Ultimate control over the lawsuit, including settlement, was left to Hall & Phillips. *Id.*

At the same time, Mr. Virani entered into an agreement with Taxpayers Against Fraud ("TAF"),[1] pursuant to which Virani and TAF would act as co-plaintiffs in the Lewis case. (*See* Benson Decl., Exhibit B). In return for TAF's agreement to advance litigation expenses, Virani agreed to give TAF 40% of any recovery awarded to Virani by the Court. Virani would retain the remaining 60%. *Id.* In addition, the agreement between TAF and Virani provided that

> If in the judgment of TAF it becomes necessary to relinquish a percentage of the recovery allocated to TAF to counsel in order to provide the most effective representation in the case, it is understood that any such percentage shall be taken exclusively from that share provided to TAF. So long as the percentage to counsel comes from TAF's share of the recovery, it shall not be necessary for Virani to separately approve whatever arrangements are necessary to secure the services of qualified counsel.

Id.

However, in September of 1988, months before Virani retained Hall & Phillips, TAF and Hall & Phillips had entered into an agreement in which Hall & Phillips agreed to represent TAF in connection with several False Claims Act cases already being litigated, as well as future cases. (*See* Benson Decl., Exhibit A). TAF agreed to pay Hall & Phillips 66$^{2}/_{3}$% of its hourly rate, and also agreed

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[1] TAF is a non-profit organization "dedicated to combating fraud against the federal government," primarily through the use of *qui tam* actions under the False Claims Act. (Budetti Decl., ¶ 2).

to pay Hall & Phillips a contingency fee of 50% of any damages received by TAF in False Claims Act cases. *Id.* Mr. Virani claims to have had no knowledge of the agreement between TAF and Hall & Phillips. (Virani Decl., ¶ 12).

In the course of litigation over the plaintiffs' statutory attorneys' fees, TAF withdrew as co-plaintiff. The attorneys and co-plaintiff were apparently concerned about a recent district court opinion holding that TAF did not have standing in a False Claims Act case. *See United States ex rel. Taxpayers Against Fraud v. Rockwell International Corp.*, 730 F.Supp. 1031 (D.Colo. 1990). Although it disagreed with the *Rockwell* court's holding, TAF withdrew in order to avoid litigating the issue in this Court.[2] However, before it withdrew, TAF entered into yet another agreement with Virani, essentially reaffirming Virani's duty to pay TAF 40% of his share of the recovery. (Benson Decl., Exhibit D).

In May of 1992, Hall & Phillips entered into another agreement with TAF. This contract, which superseded the 1988 agreement, provided that Hall & Phillips would receive at least a 50% contingency fee in each of TAF's False Claims Act cases. (Benson Decl., Exhibit E). However, the parties further agreed that a specific contingency fee could be agreed upon by the parties in connection with any particular lawsuit. *Id.* For the Lewis lawsuit, TAF agreed to pay Hall & Phillips two thirds of TAF's share of any recovery. (*Id.*, Exhibit F). This contract

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[2] Mr. Virani claims that the real reason for the withdrawal was to avoid discovery requests served by Lewis during the litigation surrounding the plaintiff's claim for attorneys' fees.

superseded the 50% provision in the May, 1992 agreement. *Id.*

During the course of the attorneys' fees litigation, the defendants became aware of the fee arrangements between Virani, Hall & Phillips, and TAF, and argued that the statutory attorneys' fee award should be lowered in light of those "fraudulent and unconscionable" arrangements. (Report and Recommendation of United States Magistrate Judge, dated June 10, 1993, pg. 3). However, adopting the Report and Recommendation of the Magistrate Judge, this Court rejected the argument on the ground that the statutory attorneys' fee provision does not prohibit such private agreements between parties and their attorneys. (Report and Recommendation of United States Magistrate Judge, dated June 10, 1993, pg. 3; Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, dated July 23, 1993). *See Venegas v. Mitchell,* 495 U.S. 82, 86-90 (1990).

At that time, however, the Court was unaware of any dispute between the plaintiff and his attorneys regarding the fee arrangements. In fact, at a hearing before the Magistrate Judge, John Phillips of Hall & Phillips represented to the Court that Mr. Virani was "fully aware, Your Honor, and supports the fee arrangements. There's no dispute here with Mr. Virani." (Rizzo Decl., Exhibit pg. 9:2-3). *See id.* at pg. 44:15-16 ("Mr. Virani, as I've represented before, fully understood all these relationships.").

At the conclusion of the fee litigation, the Court awarded $316,500 in fees. (*See* Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, pg. 1). Defendants filed a timely Notice

of Appeal in connection with the fee award. (*See* Motion for Order Setting Status Conference or Briefing Schedule, Exhibit D). However, before the appeal was briefed, defendants reached a settlement with Hall & Phillips which permitted defendants to pay the attorneys' fees on an installment basis. (*See* Rizzo Decl.). Believing that Mr. Virani's approval of the settlement was necessary, and that he would in fact approve it, defendants dropped the appeal. *Id.* When defendants executed a settlement agreement with Hall & Phillips, Virani refused to sign. *Id.*

Virani now claims that he was unaware of the arrangements between TAF and Hall & Phillips, and claims an interest in both the attorneys' fees and TAF's share of the settlement proceeds. (Virani Decl., ¶¶ 4-5), 12). Unsure of whether the fees should be paid to Virani or Hall & Phillips, the defendants filed a Motion for an Order Setting Status Conference or Briefing Schedule, and requested leave to seek sanctions against Hall & Phillips for alleged misrepresentations during the fee litigation. Alnoor Virani joined this Motion. In addition, the Government filed a Motion for Declaration of Rights in connection with the settlement proceeds. The Government's Motion was later withdrawn when Virani and TAF agreed to deposit the current installment into a jointly controlled escrow account pending a resolution of their dispute.

After briefing the issue, the defendants urge the Court to vacate the fee award and permit the issue to be relitigated in light of these newly discovered facts. As a sanction for the alleged misrepresentations, the defendants request an award of attorneys' fees reasonably

expended in the course of the earlier fee litigation. Plaintiff Alnoor Virani requests an order permitting discovery relating to the fee arrangements between Hall & Phillips, TAF, and Virani. In addition, or in the alternative, Virani requests an order directing payment to him of the attorneys' fees and the full amount of the relator's share of the settlement proceeds.

TAF argues that his Court lacks jurisdiction over its dispute with Virani regarding the settlement proceeds. If the Court determines that it has jurisdiction, however TAF requests an order directing payment of 40% of the relator's share to TAF pursuant to its agreement with Mr. Virani. Hall & Phillips requests an order directing payment of the attorneys' fees to Hall & Phillips.

DISCUSSION

A. The Settlement Proceeds.

As noted above, the two agreements between Virani and TAF called for TAF to advance litigation expenses and lend its support to the action in return for 40% of any amount recovered by Virani. (Benson Decl., Exhibits B and D). Virani now argues, in essence, that he was fraudulently induced to enter into those agreements, and thus the entire relator's share should be awarded to him. TAF, on the other hand, argues that the agreements are valid, and that it is entitled to its share of the proceeds. However, as a threshold matter, TAF argues that this Court lacks jurisdiction over the contractual dispute between TAF and Virani.

According to Virani, the Court retained jurisdiction over these issues in its Order dismissing the lawsuit after the settlement. The plaintiff is incorrect. In an Order dated January 23, 1992, the Court granted the Government's motion to dismiss with prejudice, "with the exception of the following issues: (1) any claim by *qui tam* plaintiff Virani for attorneys' fees pursuant to the False Claims Act (31 U.S.C. § 3729, *et seq.*), and (2) the award to Virani from the proceeds of the settlement between the United States, Jerry M. Lewis Truck Parts and Equipment, Inc., and Steven Lewis, pursuant to the False Claims Act." (Order dated January 23, 1992, pp. 1-2). With that Order, the Court reserved jurisdiction over the fee litigation, and the decision as to what percentage of the settlement should be awarded to Virani pursuant to 31 U.S.C. § 3730(d)(1).[3] The Court did not reserve jurisdiction over the agreement between Virani and TAF governing the disposition of Virani's share of the proceeds between Virani and TAF.

Indeed, because TAF is no longer a plaintiff, the agreement between TAF and Virani is merely a private contract in which Virani apparently agreed to give TAF a share of his recovery in exchange for TAF's agreement to advance litigation expenses. The Court approved a settlement agreement between the Government and the defendants, and subsequently determined that Virani was

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[3] Section 3730(d)(1) provides that in cases where the Government intervenes, the *qui tam* plaintiff shall receive between 15% and 20% of the proceeds of the action or settlement of the claim, depending upon the extent to which the *qui tam* plaintiff substantially contributed to the case.

entitled to 20% of that settlement. Thus, Lewis must pay $4,250,250 to the Government, and the Government must pay 20% of that settlement to Virani. Whether Virani must now pay a percentage of his share to TAF is an issue to be resolved by TAF and Virani in a separate action.

B. The Statutory Attorneys' Fees.

(1) The Right to Recover Fees Under the Statute.

In contrast with the dispute over the settlement proceeds, the court clearly retained jurisdiction over the fee litigation. After more than a year of litigation, the Court awarded $316,500 in attorneys' fees. Now at issue is whether Virani or his attorneys are entitled to collect the fees, and/or whether the issue should be relitigated.

The parties agree that under fee-shifting statutes in general, it is the party, and not his attorney, who may seek an award of attorneys' fees. *Evans v. Jeff D.*, 475 U.S. 717 (1986) (because the right to seek attorneys' fees belongs to the party, not his attorney, the party may waive such fees as part of a settlement); *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) ("Section 1988 makes the prevailing **party** eligible for a discretionary award of attorney's fees.") (emphasis in the original). According to the plaintiff, these cases require payment of the fee award to the plaintiff rather than his former counsel.

Hall & Phillips, on the other hand, urges the Court to adopt the reasoning applied by the District Court in *United States of America, ex rel., Taxpayers Against Fraud, et al. v. Teledyne Industries, Inc., et al.*, No. CV 89-2765-WJR. In *Teledyne*, one of several *qui tam* plaintiffs argued that

he, rather than his attorney, was entitled to collect the statutory attorneys' fees. The Court disagreed, and held that the fees were to be disbursed to the plaintiff's counsel. (*See* Phillips Decl., Exhibit C).[4]

The *Teledyne* Court, like this Court, faced two lines of authority that are in tension with one another. On the one hand, recent Supreme Court cases indicate that statutory attorneys' fees belong to the party rather than his attorney. *See, e.g., Evans,* 475 U.S. at 731 (Congress "neither bestowed fee awards upon attorneys nor rendered them nonwaivable of [sic] nonnegotiable") and *Venegas,* 495 U.S. at 87 ("[I]t is the party, rather than the lawyer, who is [eligible for a discretionary award of attorneys' fees.]").

On the other hand, several Circuits have suggested that such fees must be paid to counsel. For example, in *Brandenburger v. Thompson,* 494 F.2d 885, 889 (9th Cir. 1974), the Ninth Circuit wrote that "the [fee] award should be made directly to the organization providing the services to ensure against a windfall to the litigant." *See also Rodriguez v. Taylor,* 569 F.2d 1231, 1245 (3rd Cir. 1977) ("[S]ince the object of the fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel."); *Plant v. Blazer Financial Services, Inc.,* 598 F.2d 1357, 1366 (5th Cir. 1979) ("[T]he fee once awarded becomes in effect an asset of the attorney, not the client."); *Freeman v. B & B Associates.,* 790 F.2d 145, 150 (D.C.Cir. 1986) (citing *Plant*).

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[4] Judge Rea's decision in *Teledyne* is currently on appeal before the Ninth Circuit. No. 94-56482 (9th Cir. 1994).

However, none of those cases addressed the precise issue raised in this action. They therefore are not controlling. For example, in *Plant*, the Court held that in a Truth in Lending Act case, the defendant may not setoff a statutory fee award against the plaintiff's outstanding debt to the defendant. The Court acknowledged several statutes, such as Title VII of the Civil Rights Act, the Fair Labor Standards Act, and the Clayton Act, as well as cases interpreting them, which "appear to regard the attorney's fees as the property of the plaintiff." *Plant, supra*, 598 F.2d at 1366. However, the Court distinguished those statutes and cases on the ground that they did not involve the unusual setoff issue involved in the Truth in Lending Act claim. *Id.* Thus, *Plant* is best understood as being limited to its facts. *See also Freeman*, 790 F.2d at 150 (citing *Plant* for the same proposition).

In *Brandenburger* and *Rodriguez*, the issue was whether a plaintiff who is represented by a non-profit organization which does not charge for its services may be awarded statutory attorneys' fees under 42 U.S.C. § 1988. In both cases, the courts held that the fee arrangement with counsel does not affect a plaintiff's eligibility for fees. Those cases, however, did not involve a dispute over fees between the plaintiff and his attorneys. Therefore, the statements to the effect that fees should accrue to counsel were dicta, not necessary to the resolution of those cases.

Moreover, the concern over a "windfall to the plaintiff expressed in *Brandenburger* and *Rodriguez* implies that the statutory fee provision is designed to compensate plaintiffs for attorneys' fees actually incurred in litigation. Any amount of fees collected by the plaintiff rather

than his attorney would therefore be a "windfall" because it was not used to pay attorneys' fees. However, the Supreme Court has held that the statutory award is completely independent of any financial arrangement between the plaintiff and his attorney.

For example, in *Blanchard v. Bergeron*, 489 U.S 87 (1989), the Court held that the statutory fee award may exceed the amount of a contingency fee agreed upon by the plaintiff and his attorney. The Court noted that a "reasonable" fee means "reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount." *Blanchard, supra*, 489 U.S. at 93. In other words, "plaintiff's recovery will not be reduced by what he must pay his counsel." *Id.*, 489 U.S. at 94.[5]

Of course, the *Blanchard* Court did not consider the issue of whether plaintiff, as opposed to his attorney, is entitled to keep the difference between the fee agreement and the amount awarded by the court. However, the Court has consistently held that the statutory fee provisions do not control the relationship between a prevailing plaintiff and his attorney. In *Venegas*, the Court held that § 1988 does not "constrain[ ] the freedom of the civil rights plaintiff to become contractually and personally

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[5] *See also Blum v. Stenson*, 465 U.S. 886 (1984) (plaintiff who is represented free of charge by nonprofit legal aid organization is entitled to a fee award calculated on the same basis as a plaintiff represented by private counsel).

bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to the plaintiff." 495 U.S. at 87. Again, *Venegas* does not address the precise issue raised by this case, because it holds only that a prevailing party may pay his attorney more than the statutory fee award. It says nothing about the party's ability to pay the attorney less than the award and keep the difference. However, *Blanchard* and *Venegas*, read together, can be read for the proposition that the statutory fee award is independent of the financial arrangement between the prevailing party and his attorney. In other words, "§ 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer." *Venegas, supra*, 495 U.S. at 90.

Thus, in *Blanchard*, *Blum*, and *Venegas*, the Supreme Court made clear that all prevailing litigants are treated the same under fee-shifting statutes. Regardless of the financial arrangements between the litigant and his attorney, the court must award the litigant a reasonable amount of fees. This fulfills the underlying purpose of such provisions: to ensure that each litigant has available a reasonable amount of funds with which to obtain an attorney. Having done so, the court need not concern itself with any "windfall" that might accrue to the plaintiff as a result of the plaintiff's fee arrangement with counsel. Thus, the concern expressed in *Brandenburger* and *Rodriguez* regarding potential "windfalls" to plaintiffs is inconsistent with the Supreme Court's approach to

statutory fee awards as expressed in *Blanchard*, *Blum*, and *Venegas*.[6]

The *Teledyne* Court tried to reconcile these two lines of authority by distinguishing between the party's standing to request fees under *Evans* and *Venegas*, and the right to receive those fees. "Deciding that an attorney has no standing to request attorneys' fees under the False Claims Act, however, does not resolve the question of whether a *qui tam* plaintiff may personally collect amounts which have been designated as an award of attorneys' fees." (Phillips Decl., Exhibit C, pg. 2). Citing *Rodriguez*, *Plant*, and *Freeborn*, the *Teledyne* Court held that an attorney is entitled to collect a statutory award, although only the plaintiff has standing to request them.

However, this distinction between standing to seek attorneys' fees and the right to receive those fees cannot

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[6] Moreover, in *Evans*, the Court held that the District Court may not refuse to approve a settlement in a civil rights case merely because the settlement is conditioned upon a waiver of attorneys' fees. Because the right to seek attorneys' fees belongs to the party, the party is free to waive attorneys' fees, or assign them to counsel. *Evans*, 475 U.S. at 730-31 ("Congress bestowed on the prevailing party (generally plaintiffs) a statutory eligibility for a discretionary award of attorneys' fees in specified civil rights actions. It did not prevent the party from waiving this eligibility anymore than it legislated against assignment of this right to an attorney. . . . ") (emphasis original). If, as Hall & Phillips contends, statutory attorneys' fees must be awarded to counsel rather than the plaintiff, there is no reason why a plaintiff would have to assign the right the fees to counsel. Counsel would already have those rights.

be sustained. A fundamental concept underlying the doctrine of standing is that, with few inapplicable exceptions, one may not sue on behalf of someone else. *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interest of third parties."). Thus, as a general rule, the right to seek and the right to receive a remedy belong to the same person. If the party, not the attorney, has standing to seek an award of attorneys' fees, then it is the party, and not the attorney, who has the right to collect such fees.

In addition to the distinction between standing and the right to collect fees, *Teledyne* relied upon *United States, ex rel., Gibeault v. Texas Instruments Corp.*, 25 F.3d 725 (9th Cir. 1994) for the proposition that the attorney, rather than the litigant, is entitled to collect fees. In *Gibeault*, a *qui tam* plaintiff filed suit under the False Claims Act, and the Government initially declined to intervene. The parties reached an agreement in which the defendant agreed to pay $300,000 in attorneys' fees in exchange for dismissal with prejudice and a stipulation that any deficiencies in defendant's products were remedied to the satisfaction of the Government.

The Government sought to intervene and object to the settlement, but was denied by the District Court. Among other things, the Government claimed that the $300,000 in attorneys' fees constituted a settlement under the False Claims Act. The United States is entitled to at least seventy percent of any such settlement under 31

U.S.C. § 3730(d)(2).[7] The Ninth Circuit held that the Government should be permitted to intervene, and remanded for a hearing on the Government's objections because it had shown "good cause" for such a hearing.

Although *Gibeault* does not directly address the issue, the *Teledyne* Court concluded that *Gibeault's* reasoning supports the view that counsel, rather than the client, is entitled to collect statutory attorneys' fees. This conclusion reads too much into *Gibeault*. The *Gibeault* Court held that the Government had shown "good cause" for a hearing on its objections to the settlement because it appeared as though part of the $300,000 in "attorneys' fees" might have been a hidden settlement, designed to circumvent § 3730(d)(2) and prevent the Government from taking its share. The fact that parties cannot settle a case and prevent the Government from recovering simply by labelling the settlement payment "attorneys' fees" does not mean that the attorney, rather than the plaintiff, is entitled to collect fees awarded by the court.

Therefore, in light of the Supreme Court's decisions in *Evans, Blum, Blanchard,* and *Venegas,* this Court declines to adopt the reasoning of *Teledyne*. The plaintiff, not his attorney, is entitled to collect the statutory fee award.

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[7] Section 3730(d)(2) provides that where the Government does not intervene, the *qui tam* plaintiff is entitled to between 25% and 30% of any damages or settlement. Thus, the Government is entitled to at least 70% of any settlement or recovery.

(2) The Effect of the Retainer Agreement.

Even if Virani is entitled to collect the attorneys' fees under the statute, Hall & Phillips claims that he assigned his rights to such fees in the retainer agreement.[8] Such an assignment is permissible under the fee-shifting statutes. *Evans*, 475 U.S. at 730-31. However, Virani claims that he was fraudulently induced to enter into the agreement, and that the agreement is therefore void. One threshold issue, though, is whether this dispute should be resolved by this Court.

Of course, this Court may examine contingency fee agreements in order to avoid unreasonable fees. *Venegas v. Skaggs*, 867 F.2d 527, 532 (9th Cir. 1989) ("[A] district court must review a contingent fee in a civil rights case to ensure that the contingent fee is reasonable."), *aff'd sub nom, Venegas v. Mitchell*, 495 U.S. 82 (1990).[9] However, this Court is not being asked to consider the reasonableness of a contingency fee between plaintiff and his attorneys. The plaintiff assigned his statutory fees to his attorneys,

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[8] The agreement provides that "[t]he client hereby assigns the attorneys any amounts for costs, expenses, and attorneys' fees for work on the case awarded by the court or agreed to by the parties. Under no circumstances will the client oppose, or assist in opposing, any such request for attorneys' fees made by the attorneys nor will he contest or dispute the amount of fees requested thereby." (Benson Decl., Exhibit C).

[9] In *Venegas v. Mitchell*, the Supreme Court affirmed the Ninth Circuit's holding that a statutory fee award should not be limited to the amount of a contingency fee agreed on by the prevailing plaintiff and his attorney. However, the Court "ha[d] no occasion to address the extent of the federal courts' authority to supervise contingent fees."

and assigned a percentage of his recovery to TAF. The real issue is whether the plaintiff was aware of all of the relevant facts when he entered into the agreements, and, if not, whether he is entitled to any remedy.

Consistent with this Court's analysis of the Supreme Court's opinions in *Evans, Blum, Blanchard,* and *Venegas,* this issue should be resolved in a separate proceeding. The Court has awarded $316,500 in statutory fees, and has determined that under the statute the plaintiff, not his attorney, is entitled to collect those fees. Once the plaintiff has collected those fees, he may abide by his retainer agreement with Hall & Phillips, or he may attempt to keep the money. Of course, if he keeps the money, Hall & Phillips may sue for breach of the retainer agreement, and Virani will no doubt defend by asserting that he was fraudulently induced into signing it. In any event, the Court did not retain jurisdiction over these issues. The Court awarded fees to the plaintiff, who was entitled to seek them. Whether plaintiff has agreed to pay those fees to his attorneys' is a separate issue that is not controlled by the fee-shifting statute, and is therefore not properly a part of this proceeding. *See, e.g., Venegas, supra,* 495 U.S. at 90.[10]

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[10] In so holding, this Court obviously disagrees with *United States ex rel. Taxpayers Against Fraud v. General Electric,* 41 F.3d 1032 (6th Cir. 1994), in which the Sixth Circuit remanded to the District Court for consideration of many of the issues raised by Virani and the defendants. *General Electric,* however, is not binding on this Court.

(3) Defendants' Request to Reconsider the Fee Award.

In light of Virani's recent allegations, the defendants have asked this Court to vacate the fee award and reconsider the appropriate amount of attorneys' fees. As noted above, this Court has already determined a reasonable award of attorneys' fees. (Report and Recommendation of United States Magistrate Judge, dated June 10, 1993; Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, dated July 23, 1993). Virani's purported lack of knowledge of the relationship between TAF and Hall & Phillips does not change the reasonableness of the fee award (although it may affect the plaintiff's obligation to pay his attorneys). Thus there is no reason to reconsider the fee award in light of the plaintiff's recent allegations.

C. Sanctions.

Having reviewed the record, the Court does not perceive any basis upon which to impose sanctions. Therefore, the defendants' request for sanctions is DENIED.

CONCLUSION

The defendants are ordered to pay the statutory fee award to *qui tam* plaintiff Alnoor Virani. The defendants' request for discovery and reconsideration of the fee award, and the motion for sanctions, are DENIED.

IT IS SO ORDERED.

SECOND AGREEMENT BETWEEN TAXPAYERS AGAINST FRAUD AND ALNOOR VIRANI

This agreement is entered into between *TAXPAYERS AGAINST FRAUD* (hereinafter "TAF"), a non-profit California corporation, and *ALNOOR H. VIRANI* (hereinafter "Virani"), an individual who resides in Sepulveda, California. It is understood that this agreement is not a retainer agreement between an attorney and client, but rather is an agreement between an individual and a tax exempt non-profit organization who share the goal of furthering the broad social purposes of the False Claims Act and by this agreement seek to ensure that this litigation serves that goal.

Whereas, TAF and Virani are co-plaintiffs in a False Claims Act case entitled *United States ex rel. Taxpayers Against Fraud and Alnoor Virani v. Jerry M. Lewis Truck Parts, Inc., et al.*, No. 89-1302 WDK(Kx) now pending in the Central District of California before Judge William Kellar; and

Whereas, Judge Kellar has expressed doubts that TAF can meet the "original source" requirement of the False Claims Act; and

Whereas, counsel for the defendants have indicated they intend to challenge TAF's status as a plaintiff in the case; and

Whereas, the case, TAF and Virani will be better served if TAF withdraws as a plaintiff in the case prior to defendants' challenge of its status, so that plaintiffs will not receive a negative ruling against them; and

Whereas, the previous agreement entered into between TAF and Virani, attached as Exhibit A to this agreement, makes clear that the division of any proceeds awarded to the *qui tam* plaintiffs by the Court based on a percentage of the recovery to the United States Treasury will not be affected by any adverse Court decision affecting the status of TAF in the case, so that Virani will receive 60% of any such proceeds and TAF will receive 40% even if the Court dismisses TAF as a plaintiff;

NOW, therefore, based on these recitals and other factors, Taxpayers Against Fraud and Alnoor H. Virani hereby agree as follows:

(1) That TAF will withdraw as a plaintiff in the case.

(2) That the division of any proceeds awarded to the *qui tam* plaintiff(s) in the case will remain the same as that previously agreed to, namely, that Virani will receive 60% of any such proceeds and TAF will receive 40%.

(3) That this agreement in no way changes the other provisions of the agreement attached as Exhibit A.

TAXPAYERS AGAINST FRAUD

Dated: December 9, 1990 By: /s/ Leonard Jacoby
Leonard Jacoby

Dated: December 07, 1990 By: /s/ Alnoor H. Virani
Alnoor H. Virani

§ 3730. Civil actions for false claims

(d) Award to Qui Tam plaintiff. – (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

Supreme Court, U.S.
FILED
JAN 17 1997
CLERK

(2)

No. 96-787

In The

Supreme Court of the United States

October Term, 1996

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC. and STEVEN LEWIS,

Petitioners,

vs.

HALL & PHILLIPS and UNITED STATES *ex rel.* ALNOOR VIRANI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Order of the United States Court of Appeals for the Ninth Circuit Filed August 21, 1996 ..... 1a

Appendix B — Order of the United States Court of Appeals for the Ninth Circuit Filed September 9, 1996 ..... 3a

STATEMENT OF THE CASE

Petitioners Jerry M. Lewis Truck Parts & Equipment, Inc. and Steven Lewis ("Lewis") seek review of the Court of Appeals for the Ninth Circuit's decision affirming the denial of Lewis' motion for reconsideration of the district court's award of statutory attorneys' fees to Hall & Phillips ("HP").[1]

Lewis first launched his attack on HP in 1992, when HP moved for an award of attorneys' fees following the successful resolution of this case. The suit — brought by HP's clients Alnoor Virani and the non-profit organization Taxpayers Against Fraud ("TAF") pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* — alleged that Lewis had defrauded the United States by selling it military parts from unauthorized and undisclosed foreign sources, as well as parts of inferior quality. (CR 1, ER 1 - 11).[2] The government joined the suit pursuant to 31 U.S.C. § 3730(b)(4) and, with HP's assistance, eventually reached a settlement requiring Lewis to pay the government $4.25 million dollars. (*See* CR 173, ER 173). The government agreed to pay 20% of the settlement, or $850,000, to Virani, pursuant to 31 U.S.C. § 3730(d)(1).[3]

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1. Lewis' petition for rehearing of the Ninth Circuit's decision was denied. *See* Order Denying Petitions for Rehearing, August 21, 1996, attached hereto as Appendix A. In addition, the Ninth Circuit denied Lewis' motion to stay issuance of the mandate pending Lewis' petition to the Supreme Court for a writ of certiorari. *See* Order Denying Motion to Stay Issuance of Mandate, September 9, 1996, attached hereto as Appendix B.

2. Citations beginning with "CR" are to the Excerpts of Record filed by Lewis with the Ninth Circuit. Consistent with Lewis' citation in the appellate court, "CR" refers to the number assigned a document on the district court's docket sheet, and "ER" refers to the page number on the same document in Lewis' Excerpts of Record.

3. Prior to the settlement, TAF had withdrawn as a plaintiff. (*See* SER (Cont'd)

HP's motion for attorneys' fees was supported by 65 pages of detailed, contemporaneous time records which described over two thousand hours of legal work performed by the firm in this case, as well as declarations from the government regarding the substantial contributions of HP's attorneys. (SER Tab 129, at 23-24; SER Tab 142; SER Tab 150).

In response, Lewis challenged the reasonableness of the fees requested by HP, and attacked the firm's fee agreements with Virani and TAF as overreaching and unconscionable.[4] Lewis also argued that HP had misled both Virani and the court. The district court rejected each and every argument made by Lewis, awarding the full amount of attorneys' fees requested by the law firm. (CR 173, ER 175-180). The court agreed with the government that "Hall & Phillips' contribution [to the favorable settlement] was substantial." (CR 173, ER 175). In addition, the court found that the relationship among HP and its clients was legally irrelevant to the determination of a reasonable fee. (CR 173, ER 175-76). Although the court noted that it could, *sua sponte*, review the retainer agreements for reasonableness, it chose not to do so. (CR 173, ER 176, n.1). Lewis appealed

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(Cont'd)
Tab 92) ("SER" refers to the Supplemental Excerpts of Record filed by HP with the Ninth Circuit. The "Tab" numbers refer to the numbers on the district court's docket sheet.) Nevertheless, Virani had agreed to share his reward with TAF in return for TAF 's continuing agreement to fund the expenses of the lawsuit, and to pay a contingency fee to HP. (SER Tab 134, at 34-38).

4. Those agreements provided that Virani would share any amounts received by the government in this case with his co-plaintiff TAF. In return, TAF would fund the litigation and pay a contingency fee — out of TAF's share only — to counsel in the case. TAF would use any remaining amounts to help other *qui tam* plaintiffs pursue their cases. (SER Tab 134, at 34-36). In addition, Virani assigned HP any award of statutory attorneys' fees that was made in the case. (SER Tab 134, at 41).

the award, but deliberately abandoned the appeal by not filing an opening brief. (SER Tab 188).

Shortly after the attorneys' fee judgment was entered, Lewis initiated discussions resulting in an agreement whereby Lewis would pay the full amount of the attorneys' fee judgment over time and with interest. (SER Tab 198, at 180-88). However, Virani refused to sign the agreement, initially asserting that his signature was not necessary. (SER Tab 225, at 207-08). Later, Virani unexpectedly asserted that he *personally* was entitled to the *entire* amount of statutory attorneys' fees awarded by the court, as well as to the entire 20% of the government's settlement proceeds. (*See* CR 222, ER 318-19). Virani's position was a complete disavowal of both his retainer agreement with Hall & Phillips, in which he explicitly assigned the statutory fee award to Hall & Phillips, (SER Tab 134, at 41), and of his agreement with TAF, in which he agreed to share any payment he received from the proceeds of the case with TAF. (SER Tab 134, at 35).

Virani's primary argument was that Hall & Phillips had failed to inform him that the firm would receive a contingency fee payment from TAF, in addition to the award of statutory attorneys' fees from Lewis. However, substantial evidence demonstrated that Virani was fully informed regarding the terms of the fee agreements and had consented to those terms. (*See* SER Tab 134, at 34-43 (the agreements Virani signed); SER Tab 198, at 195-96 (letter from attorney John Phillips to Virani describing the contingency fee allocation); SER Tab 225, at 210 (letter from attorney Ann Carlson describing the contingency fee allocation); *see also* SER Tab 224, at 206-07; SER Tab 198, at 178-79 and 192-93 (declarations by three HP attorneys affirming that Virani never questioned or complained about the fee arrangements until long after the case was successfully concluded)).

Nevertheless, Lewis seized upon Virani's dispute with HP as an opportunity to renew his complaints regarding HP to the district court, and to seek reconsideration of the court's final judgment awarding attorneys' fees. After filing an initial motion "requesting guidance" as to whom it should pay the statutory fees, Lewis then requested that the entire award be vacated and either eliminated completely or reduced based, once again, on HP's purportedly fraudulent and unethical conduct. (SER Tab 226, at 212). Lewis also requested sanctions against HP and attorney John Phillips based on the allegation that they had defrauded the court. (*Id.*). The only "evidence" ever produced by Lewis of the alleged "fraud" were HP's fee agreements, and the fact that Virani *alleged* he had not been fully informed of those fee agreements. In response HP submitted evidence (a portion of which is cited in the preceding paragraph) demonstrating that both Virani's and Lewis' allegations were false.

On August 25, 1995, the district court reiterated its earlier holding that HP's relationship with Virani was irrelevant to the determination of a "reasonable fee" and, accordingly, denied Lewis' request that the fee award be reconsidered. (Lewis' Petition for Writ of Certiorari (Lew. Pet.") at App. 37). In addition, the district court found no factual basis for sanctions, thus rejecting Lewis' argument that HP defrauded the court.[5] (*Id.*). Lewis did not appeal the denial of sanctions.

Lewis did, however, appeal the district court's refusal to reconsider the earlier award of fees and, in his appellate brief,

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5. The district court also held that the attorneys' fee award should be paid directly to Virani, rather than to HP, upon whose labor the award was based. (Lew. Pet., at App. 34). HP appealed that portion of the district court's decision and the Ninth Circuit reversed, finding that the award of fees must be paid to the attorneys who earned the fees, rather than to the litigant. (*Id.*, at App. 11).

continued his unwarranted attack on the ethics of HP's attorneys. The Ninth Circuit found that the district court should have at least considered the allegations of ethical impropriety when determining the reasonableness of the fee award. (*Id.*, at App. 12). However, upon its examination of the "facts," (as opposed to Lewis' rhetoric), the Court of Appeals concluded that the most Lewis could argue was that there were improprieties in the formation of the attorney-client relationship between and HP and Virani. Under clearly established state law, however, these alleged improprieties, even if proven, would not necessitate a reduction in the award of attorneys' fees which was clearly based on the actual and substantial legal work performed by the attorneys in the case. (*Id.*, at App. 12-14).

Lewis now seeks another forum in which to launch his completely false allegations of misconduct.

SUMMARY OF ARGUMENT

This is not an appropriate case for review by the Supreme Court. First, Lewis has failed to present an appropriate question for review. (*See* Lew. Pet. at i). The issue in this case is not whether a "reasonable" attorneys' fee award can properly include fees incurred in the furtherance of fraud or ethical improprieties, nor is the issue whether the Ninth Circuit failed to consider whether the fee award in this case included fees earned in furtherance of a fraud. To the contrary, the Ninth Circuit found that Lewis' allegations of ethical misconduct *were relevant* to the determination of the reasonable fee that Lewis must pay under the False Claims Act. (Lew. Pet., at App. 12). Although the Ninth Circuit declined to resolve all of the factual disputes between the parties, it did examine the substantial evidence in the district court record and determined that, "under the facts of this case," there was no basis for reducing the amount of attorneys' fees awarded by the district court. (*Id.*, at App. 12-14).

Lewis' quarrel is not with the legal standard applied by the Ninth Circuit — that defendants must only pay a "reasonable" fee — but with the way the Court of Appeals applied that standard to the facts of this case. This case does not rest on a difficult or important question of law. Rather, it rests on an intensely factual determination which was carefully — and correctly — made by the Ninth Circuit, despite Lewis' earnest attempts to mislead the court with false and distorted descriptions of the record. Nothing will be gained by this Court expending its precious resources reviewing that factual record again.

The waste of judicial resources would be particularly acute in this case, given Lewis' strong propensity towards misstatements of the factual record. Throughout the extensive district court and appellate proceedings in this case, in an effort to impugn his successful opposing counsel, Lewis repeatedly asserted facts which were either demonstrably false or egregiously distorted. Lewis' petition to this Court is no exception.

Indeed, the questions for review presented by Lewis are based on an implied fact — that HP was awarded statutory attorneys' fees for time spent committing fraud — which is simply false. Despite having numerous opportunities to do so, Lewis has never presented a single piece of evidence in support of that assertion, and it was properly rejected by both the district court and the Ninth Circuit. Both courts had before them detailed records documenting over 2000 hours of attorney time spent by HP litigating the case on Virani's behalf, and both courts found the hours worked to be legitimate and reasonable.

Finally, Lewis has attempted to manufacture a conflict between the circuits where none exists. The Ninth Circuit's decision in this case is perfectly consistent with the Sixth

Circuit's decision in *United States ex rel. Taxpayers Against Fraud v. General Electric Company*, 41 F.3d 1032 (6th Cir. 1994). The courts in both this case and *GE* found certain allegations of ethical improprieties to be relevant to the courts' determination of what constituted a reasonable statutory attorneys' fee. In this case there was a substantial factual record for the Court of Appeals to review regarding those allegations. After reviewing the factual record, the Ninth Circuit found no basis for reconsidering the award of attorneys' fees. The court in *GE*, however, had no factual record to consider and, accordingly, remanded the case to the district court for additional fact finding. There is no conflict between the circuits.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO PRESENT A PROPER ISSUE FOR REVIEW BY THIS COURT.

The questions presented for review in Lewis' petition are based on a fundamental misunderstanding of the decision rendered by the Ninth Circuit in this case. Lewis asserts that both the district court and the Ninth Circuit "rejected Lewis' argument that the award of reasonable attorneys' fees under the False Claims Act could not as a matter of law include any amount with reflected fees incurred [in the furtherance of fraud or ethical improprieties]." (Lew. Pet., at 8). What Lewis fails to acknowledge is that the Court of Appeals specifically found that the allegations of "fraud and unethical conduct" *were* relevant to the reasonableness of the fees. (*See* Lew. Pet., at App. 12 (finding that the district court erred in failing to address Lewis' argument)).

The Ninth Circuit itself examined the allegations and the

evidence in the record and determined that, at bottom, Lewis' allegations pertained not to the legitimacy of the fees charged, but to the relationship between HP and Virani and the initial negotiation of the fee arrangements. The Court of Appeals made a factual determination that there was no conflict of interest in the attorney/client relationship and that, under clearly established California law, the attorneys' were therefore entitled to, at a minimum, a *quantum meruit* fee. The Court of Appeals made a further factual determination that Lewis was only being required to pay a *quantum meruit,* or "reasonable," fee. (*Id.*, at App. 12-14).

Accordingly, the only potential issue for review is whether, in applying the "reasonableness" standard to the award of attorneys' fees in this case, the Ninth Circuit erred in its factual findings. Lewis has not presented this issue for review and, even if he had, it would not be an appropriate use of the writ of certiorari. *See* Sup. Ct. Rule 10 (a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

In addition, Lewis' "Questions Presented" are based on an implied fact — that the statutory fee award includes attorneys' fees for time spent by HP perpetrating a fraud — that is demonstrably false. First, the district court determined that HP had not defrauded the court when it denied Lewis' motion for sanctions. (Lew. Pet., at App. 37). The motion was explicitly based on Lewis' unfounded assertion that HP defrauded the court. (SER Tab 226, at 212). Since Lewis did not appeal the denial of sanctions, he is precluded from reasserting his "fraud on the court" theory.

Moreover, Lewis has never presented a shred of evidence that the attorneys' fee award included fees for time spent by HP doing anything other than legitimate legal work on the case.

Although all of HP's billing records — comprising 65 pages of detailed time entries — were before both the district court and the Court of Appeals, Lewis was never able to point to a single entry that was supposedly improper. Both courts examined the facts in the record, and determined that the hours billed were reasonable.

Thus, Lewis has failed to present a proper question for review. The petition should be denied on that basis alone.

II.

THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE AWARD OF ATTORNEYS' FEES AGAINST LEWIS WAS REASONABLE.

Contrary to Lewis' assertion, the Ninth Circuit did not simply "presume" that the statutory award of attorneys' fees was reasonable. (*See* Lew. Pet., at 13). Rather, the Court of Appeals made a factual determination that the fees awarded were reasonable based on the extensive record before the court, and based on a close examination of the allegations put forward by Lewis.

The record in this case included HP's original fee application, which was comprised of extremely detailed, contemporaneously prepared records — down to fifteen minute increments — of the over 2000 hours spent by HP attorneys working on the case. (SER Tab 150). These time records reflect the time HP spent legitimately litigating and resolving the matter. The record included every fee agreement among HP, Virani and TAF. (SER Tabs 134 and 169). The record included declarations regarding the nature of HP's relationship with TAF, and regarding TAF's role in the lawsuit. (SER Tabs 198 and 228). The record also included evidence, including explicit written

communications between HP and Virani, which demonstrated that Virani was fully advised of all of the fee arrangements in this case. (SER Tabs 134, 198 and 225).

Thus, it was not in a vacuum that the Ninth Circuit determined that there is no hint in this case that

> there was any conflict of interest whatever. Nor was there any suggestion that HP did not perform valuable services for Virani or that anything is amiss in the calculation of the reasonable amount of fees for those services.

(Lew. Pet., at App. 13). The Ninth Circuit appropriately found that Lewis' arguments amounted to "no more than an assertion that HP handled its fee arrangement in a way that might have the taint of some impropriety." (*Id.*, at App. 14). While the Court of Appeals declined to decide whether, in fact, any impropriety was present, it correctly concluded that even if there were some impropriety, HP would "still be entitled to recover the reasonable value of its services." (*Id.*). The court further determined that, based on its review of the record, Lewis had only been required to pay a "reasonable fee." (*Id.*, at App. 13-14). Lewis' contention that it has been required to reimburse HP for time it spent committing fraud or ethical violations is therefore wholly unsupported by the facts.

III.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Lewis asserts that the Ninth Circuit's decision in this case is in direct conflict with the decision of the Sixth Circuit in *United States ex rel. Taxpayers Against Fraud v. General Electric Company,* 41 F.3d 1032 (6th Cir. 1994). Lewis' assertion of a

conflict is based on his fundamental misunderstanding of the Ninth Circuit's holding, as discussed above. In its decision, the Ninth Circuit specifically considered Lewis' allegations of fraud and unethical conduct, and the facts upon which they were based, and found them to be legally insufficient to require a reduction in the fee. Similarly, in *GE*, the court found that certain allegations of ethical improprieties were relevant to the determination of a reasonable attorneys' fee. Unlike this case, however, the court in *GE* lacked a sufficient factual record to resolve the allegations, and therefore remanded for additional fact finding. *See* 41 F.3d at 1044.

The Sixth Circuit also directed the district court to entertain facts regarding TAF's role in the lawsuit, whether TAF's participation raised any ethical issues, and the validity of the fee agreements. *Id.* With one exception,[6] however, these latter inquiries were not considered to be relevant to the determination of a reasonable fee. Rather, the Court of Appeals held that if the fee agreements failed for some reason, the court should "make appropriate findings modifying the division of the bounty [*i.e.*, the relators' share] and the contingency fees among the parties." *Id.* at 1045. In this case, the division of the relators' share and the contingency fee was not before the Ninth Circuit.

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6. The Court of Appeals did indicate that the district court's findings regarding TAF might impact "*TAF's portion* of the attorneys' fee award." 41 F.3d at 1044 (emphasis added). Here of course, TAF was not awarded statutory attorneys' fees, so this aspect of the *GE* decision is inapposite.

IV.

LEWIS' REPEATED MISSTATEMENTS OF THE RECORD ALONE WARRANT DENIAL OF THE PETITION.

In addition to the many reasons already asserted, Lewis' petition for a writ of certiorari should be denied because acceptance of the case will require the Court to expend its limited resources parsing through the numerous and egregious falsities presented repeatedly by Lewis.

While responding to each of the misstatements in this brief is unnecessary, given the many other deficiencies in Lewis' petition, HP feels compelled to at least point out some of the more serious untruths.

For example, Lewis falsely states that HP never disclosed to Virani its relationship with TAF, or TAF's agreement to pay a contingency fee (out of TAF's share) to HP. (Lew. Pet., at 4). In fact, Virani's agreement with TAF specifically provided that TAF could pay a contingency fee to counsel, out of its share. (SER Tab 34, at 35-36). Further, once the case was settled, HP advised Virani in writing, on two separate occasions, of the precise amount that HP, Virani and TAF would receive from the proceeds of the case pursuant to the fee agreements. (SER Tab 198, at 195-96; SER Tab 225, at 210).

Lewis falsely states that TAF played no role in advancing this case. (Lew. Pet., at 14). In fact, the uncontroverted evidence demonstrates that TAF paid for the ongoing expenses of the litigation so that Virani would not have to, and paid a contingency fee to HP which, had TAF not paid, Virani would have paid. (SER Tab 228; SER Tab 134, at 33; SER Tab 225, at 211-14).

Lewis falsely implies that John Phillips misled the district court during the initial hearing on HP's motion for attorneys' fees when he stated that "Virani fully understood . . . and supports the fee arrangements." (*See* Lew. Pet., at 11). In fact, John Phillips' statements were true. Virani fully understood the arrangements, both from the fee agreements themselves, and from HP's explicit letters explaining them. (*See* citations above). It was not until HP's services were completed in the case and Virani saw an opportunity to extort money from his attorneys that he first asserted his lack of support for the fee arrangements. (SER Tab 225, at 206-08).

Both the district court (on two separate occasions) and the Court of Appeals have sorted through Lewis' many unfounded allegations and determined the reasonableness of the award of fees to HP. There is no justification for revisiting Lewis' allegations.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 21, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56396

D.C. No. CV-89-01302-WDK-Ex

UNITED STATES OF AMERICA ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

v.

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; STEVEN LEWIS; ROBERT HOLTZMAN,

Defendants,

and

HALL & PHILLIPS,

Appellants.

No. 95-56456

D.C. No. CV-89-01302-WDK-Ex

UNITED STATES OF AMERICA, ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

Appendix A

v.

STEVEN H. LEWIS; JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; ROBERT HOLTZMAN,

Defendants-Appellants.

ORDER DENYING PETITIONS FOR REHEARING, REJECTING SUGGESTION FOR REHEARING EN BANC, AND DENYING MOTION TO CONSOLIDATE

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

The petition of defendants-appellants for rehearing is DENIED.

The panel has unanimously voted to deny the appellee's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration. The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appellee's motion to consolidate this case with *United States of America ex rel. Taxpayers Against Fraud v. Kirchoff*, No. 94-56482, is DENIED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 9, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56396

D.C. No. CV-89-01302-WDK-Ex

UNITED STATES OF AMERICA ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

v.

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; STEVEN LEWIS; ROBERT HOLTZMAN,

Defendants,

and

HALL & PHILLIPS,

Appellants.

No. 95-56456

D.C. No. CV-89-01302-WDK-Ex

Appendix B

UNITED STATES OF AMERICA, ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

v.

STEVEN H. LEWIS; JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; ROBERT HOLTZMAN,

Defendants-Appellants.

ORDER DENYING MOTION TO STAY ISSUANCE OF MANDATE

Before: FERNANDEZ, Circuit Judges.

The motion of defendants-appellants to stay issuance of mandate pending petition to Supreme Court for writ of certiorari is DENIED.